KESAVAN PONNAIAH

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI MALAYSIA & ORS

HIGH COURT MALAYA, SHAH ALAM
ABANG ISKANDAR JC
[CRIMINAL APPLICATION NO: 44-42-2008]
27 JUNE 2008

PREVENTIVE DETENTION: *Detention order - Right to counsel - Hearing before Advisory Board - Counsel not served with notice in Form 2 - Whether r. 5(1) Public Order and Prevention of Crime (Procedure) Rules 1972 breached - Whether Board had knowledge of appointment of counsel - Refusal of Board to grant further adjournment, whether unfair - Hearing proceeded without detainee having legal representation, whether constitutional guarantees violated - Detention under s. 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969*

CONSTITUTIONAL LAW: *Fundamental liberties - Right of detained person - Right to representation - Detention under s. 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Hearing before Advisory Board - Counsel not served with notice in Form 2 - Whether r. 5(1) Public Order and Prevention of Crime (Procedure) Rules 1972 breached - Whether Board had knowledge of appointment of counsel - Refusal of Board to grant further adjournment, whether unfair - Hearing proceeded without detainee having legal representation, whether constitutional rights denied*

The applicant was being detained without trial for two years pursuant to a detention order issued by the Deputy Minister of Internal Security ('the Minister') under s. 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969. He submitted his notice in 'Form 1' to the Secretary ('the Secretary') of the Advisory Board ('the Board') indicating therein his intention to have legal representation at the hearing before the Board. A hearing date was then fixed by the Chairman of the Board and communicated to the applicant in 'Form 2'. Thereafter, the Board convened twice but did not proceed with a hearing. At the third sitting, the Board proceeded to hear the applicant's representations despite his application for another adjournment. Counsel was not present.

Before the High Court herein, counsel for the applicant submitted that the respondents had failed to comply with r. 5(1) Public Order and Prevention of Crime (Procedure) Rules 1972 ('the 1972 Rules') in that a notice in Form 2 was not served on his law firm ('the Firm') which was acting for the applicant. It was submitted that the Board - in proceeding to hear the applicant's representations without his counsel being present - had infringed upon his constitutional rights guaranteed under the Federal Constitution.

Held (dismissing the application):

(1) Although the Firm had sent a letter ('the letter') to the officer-in-charge ('the Officer') of the detention centre informing the latter that it was acting for the applicant in the matter, such knowledge could not be imputed to the Board. The letter was not copied to the Secretary or even the applicant himself - which the Firm ought reasonably to have done. The Officer was also not under a statutory duty to inform the Board about the letter. Hence, as the Board had no knowledge, actual or imputed, that the Firm was acting for the applicant, there was no breach of r. 5(1) of the 1972 Rules when the Board did not serve a copy of the notice in Form 2 on the Firm. (para. 14)

(2) The applicant's notice in Form 1 as submitted to the Secretary only evinced his 'intention' to be legally represented at the hearing before the Board. It did not communicate the fact that the Firm had been appointed to act for the applicant. (para. 15)

(3) Notwithstanding holdings (1) and (2) above, it was clear from the facts that the applicant had not yet appointed the Firm at that particular point in time when the Board refused to grant him a third adjournment. (para. 16)

(4) The Board had exercised its discretion reasonably in managing the hearing of the applicant's representations. Its refusal to grant a third adjournment was justified. Sufficient and reasonable leeway had been afforded to the applicant to engage the services of a lawyer to represent him at the hearing of his representations. There was no non-compliance with the 1972 Rules. (paras 17 & 18)

[Habeas corpus refused.]

Case(s) referred to:
Ramu Kuppusamy lwn. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Yang Lain [2006] 4 CLJ 752 HC ***(refd)***

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Public Order and Prevention of Crime (Procedure) Rules 1972, rr. 3(2), 5(1), 10

For the applicant - P Visnuvarman; M/s Alvinthiran & Partners
For the respondents - Mohd Azlan Shah Mohd Allias DPP; AG's Chambers

Reported by Gan Peng Chiang

JUDGMENT

Abang Iskandar JC:

[1] The Deputy Minister of Internal Security had issued a Detention Order ('DO') pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the parent Ordinance'), against this applicant on 7 June 2007 for a period of two years (encl. 4 para 5) and it was served on him on 8 June 2007.

[2] Together with the 'DO', the applicant was also served with three copies of the statutory notice, commonly known as borang I, which would enable the applicant to submit his representations to the advisory board protesting against his detention by the said Deputy Minister. This borang I is created under r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules, 1972 ('the (Procedure) Rules, 1972').

[3] A copy of a properly filled-up borang I by this applicant was sent by En Che Kob bin Mohd. Noor, The Officer-in-Charge of Pusat Pemulihan Akhlak Simpang Renggam, Johore (PPA Simpang Renggam) to the Secretary of the Advisory Board, one Rosnah Abdul Aziz ('RAA') indicating in the same that he had intended to engage legal counsel to represent him at the hearing before the said board.

[4] The chairman, then fixed a hearing date for the hearing of the said representation and that was communicated in borang II, the purpose of which has been to inform this applicant of the hearing date of the representation before the advisory board.

[5] The advisory board had convened three times for the purpose of hearing this applicant's representations, but it was not able to proceed during two of the earlier occasions. At the 3rd sitting that took place on 2 August 2007, the advisory board proceeded on with the hearing, although the applicant had applied for another adjournment, being the 3rd adjournment application. As such, that hearing had proceeded without legal representation on the part of this applicant.

[6] The advisory board then made the necessary recommendations to His Majesty Yang Di Pertuan Agong ('His Majesty the King') based on the findings at that hearing and had forwarded the same to the King well within the time period prescribed under the law.

[7] Those are the accepted and agreed facts surrounding this case between the litigating parties that had appeared before me on 20 June 2008.

[8] Before me, it was argued by En. Visnu, the learned counsel for the applicant, that there had been a non-compliance committed by the respondents in that the borang II (or Form II) was not served on his legal firm, Tetuan Alvintheran & Co, being the legal firm purporting to be acting for this applicant.

[9] Specifically, the non-compliance, as alleged by learned counsel, was in respect of the express provisions as contained under r. 5(1) of the said (Procedure) Rules, 1972 which reads as follows:

> 5. (1) When any representations are received by the Secretary from a detained person stating that he desires to appear or to be represented before the Board, the Chairman shall appoint a time and place for the consideration of the representations by the Board and shall cause notice thereof in Form II in the Schedule to be served on the detained person **and on his advocate if any**. (emphasis added)

[10] Such contention by the learned counsel was based on what have been contained in the affidavits affirmed by this applicant appearing in this court as encl. 3 and encl. 14. The fact that the applicant was served with three copies of borang I was not denied. Although there was nothing in all the affidavits of all parties filed in this court for this case to state expressly that this applicant had indicated his intention to be represented by counsel at his hearing when he was served with the 'DO', the grounds justifying the detention and the explanations on them and on his rights regarding the representations, it was agreed by both parties that the fact that En. Cik Kob had served the applicant with three copies of borang

I, it must be read to mean that the latter must have indicated his desire to be legally represented at the hearing before the advisory board. This court should think that such a conclusion ought to be inevitable under the circumstances. Another reason raised by this applicant has been the cumulative effect of the existence of the three documents that had been collectively marked as exh. 'KP2' appearing in encl. 14. Central in this 'KP2' has been the letter bearing the letterhead of the legal firm, Alvinthiren & Partners dated 8 June 2007 purporting to inform the officer-in-charge of PPA Simpang Renggam that the firm was acting to represent this applicant henceforth. The AR card showed that the said letter was received by the PPA Simpang Renggam as evidenced by the endorsement on it by one 'Norman'. The same letter was also faxed over to the PPA Simpang Renggam as evidenced by the faxing record kept by the said legal firm and exhibited by the applicant in the same affidavit encl. 14 in this court as part of 'KP2'. No rebuttal affidavit was filed by the respondents on this matter. However, having said that, the said letter was admittedly not sent by the said legal firm to this applicant nor was it sent to the secretary of the advisory board. To my mind, this issue relating to the said letter would prove pivotal in determining the assertion by this applicant that the respondents had breached the obligation incumbent upon them under the said r. 5(1).

[11] With that background in relation to the appointment of legal counsel, the subsequent events then played out as follows: Having received the borang I from this applicant, the advisory board had sent him the borang II informing him of the date and the place of hearing of the applicant's representation. No such Borang II was sent by the advisory board to the legal firm, Alventhiren & Partners. The first hearing was set for 5 July 2007. That hearing did not proceed and was adjourned to 25 July 2007, on application by this applicant for an adjournment. On that date, the hearing was again adjourned to 2 August 2007 pursuant to another application for an adjournment by this applicant. On 2 August 2007, this applicant again applied for an adjournment but this time it was refused by the advisory board and the hearing of his representations was heard eventhough there was no legal representation for this applicant. The findings coming out of this hearing on 2 August 2007 became the basis upon which the recommendations to His Majesty the King were premised.

[12] As a result of these turn of events surrounding the said hearing of the advisory board that had sat on 2 August 2007, this applicant had before me cried foul and complained that the said

hearing had not been a fair and efficient hearing which had infringed in essence, the protection granted to him under the Federal Constitution.

[13] The question has now become: did the advisory board act fairly when it had proceeded on to hear the representations of this applicant without his counsel being present thereat on 2 August 2007. In order to answer this question, three matters assume importance, namely, (a) the 'KP2', (b) the borang I that was sent by this applicant and received by the advisory board on 12 June 2007, and (c) what had transpired during the three hearings before the advisory board, which must be considered as relevant touch posts and the affidavits that relate to them must now be scrutinized by me in turn, before I could rule meaningfully on the issue at hand.

[14] Regarding (a) above, as adverted to earlier on by me, this letter was sent only to the officer-in-charge of the Pusat Pemulihan at Simpang Renggam. According to learned counsel, it was the duty of the said officer to then bring this letter to the attention of the advisory board. In other words, he was imputing knowledge of 'KP2' on the advisory board and that as such, when the counsel was not served with a copy of borang II informing him of the date and place of the hearing, the advisory board had so failed to comply with the set procedure under r. 5(1). My take on the said r. 5(1) is that the advisory board would indeed be in breach of the set procedure contained therein, if having knowledge of the appointment of a counsel for this applicant, it nevertheless omitted to send a copy of borang II to the said counsel. In this case, there is the affidavit of RAA in encl. 13 which clearly showed that the advisory board had no such knowledge regarding the appointment of any counsel to act on behalf of this applicant. Of course, as was alluded to earlier by me, the applicant had submitted that such knowledge ought under the circumstances be imputed on the advisory board. It is to be noted that the letter in 'KP2' was not copied even to this applicant neither to the secretary of the advisory board. To my mind, the reasonable implementation of the provisions of r. 5(1) also requires reasonable exercise of discretion on the part of both the counsel involved, as well as this applicant himself. In the overall scheme of things involving r. 5(1), it is my considered view that the counsel from the legal firm of Alvintheran & Partners, ought to have notified the Secretary of the advisory board of the facts as contained in the letter exhibited as 'KP2'. It is also my finding that the officer-in-charge of the Pusat Pemulihan at Simpang Renggam was under no statutory duty to inform the advisory board of the said

letter from the said legal firm. That is clearly borne out by the reading the said (Procedure) Rules, 1972 of which the provisions of r. 3 are an integral part thereof. On the balance of convenience, it would be less onerous on the part of the counsel to inform the advisory board that his firm was acting for this applicant, than it would be for the advisory board to inquire who would be acting for the applicant before the borang II was sent out under r. 5(1). That being the view that I had taken, there was therefore no such knowledge to be imputed to the advisory board on the appointment of counsel for this applicant. That being the case, as the advisory board had no such knowledge, actual or imputed it therefore did not breach r. 5(1) when it did not send a copy of borang II to the counsel. To say otherwise would be tantamount to expecting the advisory board to perform a factual impossibility.

[15] As regards (b), it will be recalled that this applicant had sent in the borang I to the advisory board indicating clearly in it, by deleting the relevant (or rather irrelevant) phrases in it, that he would be attending the hearing and that he intended to appoint a legal counsel to represent him at the hearing as well. Exhibit marked 'KP1' in encl. 3 is relevant in this regard. At this juncture too, it is useful to recall that the letter of appointment as counsel acting for this applicant dated 8 June 2007 was admittedly not served on this applicant. To my mind, this fact assumes great significance when this court has to consider and decide what actually had happened at the three dates of hearings before the advisory board. It is my finding that the borang I that was received by the secretary of the advisory board from this applicant on 12 Jun 2007 had established as a fact in the mind of the advisory board that this applicant had communicated only his intention to be represented at the hearing of his representations before the advisory board. There was nothing in the borang I that showed who, if any, had been so appointed by this applicant to represent him for that purpose. Bearing in mind that the letter dated 8 June 2007 was not even extended to this applicant, it would not be a surprise at all if this applicant did not know who that lawyer was when the advisory board sat three times to hear his representations.

[16] Now, proceeding as I must to the matter referred to in (c) above, there would appear to be a difference in the depiction to this court by both sides as to what had actually happened at the hearing dates before the advisory board on 5 July 2007; 25 July 2007 and 2 August 2007 regarding the applications made by this applicant for an adjournment during those hearings. According to this applicant,

as was averred by him in his 2nd affidavit marked as encl. 14, he had to so apply for all the three adjournments at the said hearings because his counsel could not appear. No reason was given why the counsel could not appear for all these three hearings and no particulars were given to the advisory board regarding his counsel by this applicant. Nevertheless, the advisory board had granted the earlier two of the three such applications, but on the express ground so that this applicant could appoint his lawyer. As could be seen in the affidavits of RAA appearing as encl. 13 and encl. 15, the reason for this applicant's applications for all the adjournments had been that he had yet to appoint a lawyer to represent him. His third application for an adjournment made on 2 August 2007 was refused on grounds as outlined by RAA in encl. 13 and encl. 15. Weighing all these, and having regards to all the circumstances surrounding the appointment of the counsel in 'KP2', and the admitted fact by learned counsel before me that the letter in 'KP2' was not served on this applicant, I have come to the finding that the adjournments had been so sought by this applicant so as to enable him to appoint his lawyer. Had he indeed appointed his lawyer by then, he would have done what the detainee in the case of *Ramu Kuppusamy lwn. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Yang Lain* [2004] 4 CLJ 752 had done. In that *Ramu* case *(supra)*, the advisory board had refused to grant him an adjournment of his hearing before the advisory board on the ground that his lawyer whom he had named could not appear on that appointed day. Ramu had even given the address and the telephone number of his lawyer to the advisory board so that the advisory board could so verify if it had so wished. In that case, the advisory board had nothing of it and refused to allow Ramu an adjournment on that ground and had proceeded to hear his representations in the absence of his lawyer who could not appear. Ramu had so complained before Justice Azahar Mohamed in the Johore Bharu High Court and the learned judge had agreed that in the circumstances such hearing had infringed Ramu's right to a fair hearing of his representations. But in this case before me, no such similar scenario had taken place. If his lawyer could not appear for the 3rd time, surely this applicant, as any reasonable person in his situation would, he must have informed the advisory board of the particulars of his lawyer so that the advisory board could, if it was so minded, verify this applicant's assertion. Under the circumstances, I found the averments on this matter by RAA to be more probable than those made by this applicant. The fact that the legal firm Alvintheran & Partners did not extend nor inform this applicant of its role in this matter further bolsters my belief that at

all material times this applicant had not appointed any counsel to represent him at the hearing of his representations. As such, it is my finding that this applicant had applied for the three adjournments so as to enable him to appoint a lawyer to represent him at the hearing of his representations.

[17] But my having so ruled *per se* as above, would not put away the challenge by the learned counsel that the refusal to grant the 3rd adjournment by the advisory board had been a decision that could be justified under the circumstances. Now, what have been the reasons for such refusal as assigned by the advisory board? All these reasons now reside in the affidavits marked as encl. 13 paras. 11 and 12 and substantially repeated encl. 15 of RAA. In encl. 15 she had referred to r. 10 of the Rules (Procedure) 1972 and had expressed her opinion that the provisions thereunder as giving the board the power not to assign any explanations in detail pertaining to the reason(s) for refusing any application for adjournment. Be that as it may, I agree with learned counsel that once reasons were in fact assigned by the advisory board, they became fair game for comment and scrutiny. According to this applicant, he had applied for the three adjournments because his counsel was not present to attend the hearings, as contained in para. 5 of his further affidavit encl. 14, where the applicant had said, *inter alia*: " ... telah memohon untuk satu penangguhan atas alasan peguam saya tidak hadir ..." No other particulars were assigned why his counsel could not so attend for three times. To my mind, merely repeating the same reason without further explanation is not exactly a reasonable justification that would invite a favourable response to an application for an adjournment based on the same ground. It does not exactly help the advisory board to come to any useful decision in that regard. But these three applications for adjournments were, as found as a fact by me, based on the fact that he had needed time to engage a lawyer to represent him, not because his lawyer was not present. If indeed this applicant had engaged a lawyer by the time he appeared before the advisory board, he would have informed the said board more particulars about his lawyer. The fact of the matter is that, at the material times this applicant had not engaged any counsel to represent him. If indeed the legal firm Alventhiren & Partners had been so appointed by this applicant, he would have informed the Board accordingly, even during the 1st hearing and the borang II could have been sent to the said firm informing the firm of the next date of hearing of the representations. Any reasonable person in his situation would have acted as such. Having looked at the

A reasons given by the advisory board for its refusal to grant the 3rd application for adjournments on the same ground of his lawyer was not present for three consecutive times, I cannot say that they were unreasonable either taken individually or collectively. The fact that the advisory board had about three weeks to spare before the three
B months period expired and that it could be further extended, did not necessarily mean that it must be exhausted in a manner that must facilitate this applicant's situation. To my mind, the advisory board had exercised its discretion reasonably under the circumstances. I agree with the learned SFC En. Othman that the
C reference by RAA to r. 10 was an attempt to justify to this court that the advisory board has wide discretion in the conduct of its proceedings where there exists no set procedures and that must necessarily include the discretion on how to deal with application for adjournments. Needless to say, such discretion like any other must be exercised judiciously, not capriciously. In this case, the
D advisory board had acted reasonably in its management of the hearing of this applicant's representations in the context where his applications for adjournments are concerned. That being the case, I find as a fact and as a matter of law that such refusal by the advisory board to grant the application for an adjournment on
E 2 August 2007 under the circumstances then obtaining before it, was justified. Sufficient and reasonable leeway had been afforded to this applicant to engage the services of a lawyer to represent him at the hearing of his representations on his detention. With respect, I disagree with the learned counsel that this applicant had been
F deprived a fair and effective hearing, under the circumstances of this case.

[18] Such being the case, I am of the view that there has been no non-compliance committed by the respondents or their agents in the matter related to the detention of this applicant. I would
G therefore not be moved to issue the writ of *habeas corpus* for the release of this applicant. Application is hereby dismissed.

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